Appeals Before The Bankruptcy Appellate Panel Of The Ninth Circuit

DECEMBER 2010 EDITION

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I. INTRODUCTION[1]

These materials are designed to assist attorneys and litigants involved in a bankruptcy appeal before the BAP.

Appellate rules are found in Part VIII of the Federal Rules of Bankruptcy Procedure (FRBP), Rule 8001 et seq. To view these rules, see http://www.law.cornell.edu/rules/frbp/#part_viii Local rules of the BAP also apply. Revised local rules for practice before the BAP were adopted by the Ninth Circuit Judicial Council on February 24, 2000, and may be found on the BAP website at http://www.bap09.uscourts.gov

A number of amendments to the Federal Rules of Bankruptcy Procedure became effective on December 1, 2009, including changes to the time for the filing of a notice of appeal and completion of the record on appeal. A complete list of these rule changes may be found at http://www.uscourts.gov/rules/

Where national and local rules are silent or where they so specify, the Federal Rules of Appellate Procedure (FRAP), the Federal Rules of Civil Procedure (FRCP), the Federal Rules of Evidence (FRE) or the Ninth Circuit Rules (Circuit Rules) may apply. See 9th Cir. BAP R. 8018(b)-1.

II. JURISDICTION OF THE BAP

Under the Bankruptcy Code, the district court has always had the jurisdiction to review decisions of a bankruptcy court. 28

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[1] This summary is the cumulative work of many current and former BAP judges, law clerks and staff dedicated to the common pursuit of providing up-to-date materials to the public and bar. While they have been updated numerous times, these materials were first prepared and released on March 15, 1985, by the Hon. Sidney C. Volinn, who served as a BAP Judge and Bankruptcy Judge from the Western District of Washington.

The analysis contained herein is summary in nature, is not intended as legal advice, and is no substitute for legal research. It is the responsibility of attorneys and litigants to review and comply with applicable laws and rules governing appellate practice and procedure.

U.S.C. § 158(a).[2] However, a circuit may establish a BAP, 28 U.S.C. § 158(b), and the Ninth Circuit has had a BAP since the effective date of the Bankruptcy Code, October 1, 1979.[3] The Bankruptcy Reform Act of 1978, which became effective on October 1, 1979, authorized the creation of the BAP.

Following the decision of Northern Pipeline Constr. Co. v Marathon Pipe Line Co., 458 U.S. 50 (1982)(holding that the Act unconstitutionally conferred the essential attributes of judicial power on non-Article III bankruptcy judges), and passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984, the Ninth Circuit re-established the BAP by Order of the Judicial Council, in 1985. That order was most recently amended as of May 9, 2002, and is set forth at the end of these materials.

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[2] 28 U.S.C. § 158(a) provides:

> (a) The district courts of the United States shall have jurisdiction to hear appeals
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> (1) From final judgments, orders, and decrees;
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> (2) From interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
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> (3) With leave of the court, from other interlocutory orders and decrees;
>
> and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceeding referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving. [Redundancy in Original.]

[3] Currently, the First, Sixth, Eighth and Tenth Circuits have also established a BAP. In December 1999, the Second Circuit discontinued its BAP, as only a few of the smaller districts in that circuit participated (significantly, the Southern District – New York City – did not authorize bankruptcy appeals to the Second Circuit BAP). District judges must authorize appeals to the BAP from their districts (28 U.S.C. § 158(b)(6)), and all of the districts of the Ninth Circuit have granted that authorization.

Specific issues of appellate jurisdiction are discussed in sections V and VII.C, below.

III. INTRODUCTION TO THE BAP

Seven bankruptcy judges are authorized by the Ninth Circuit Judicial Council to serve on the BAP. Each appeal is heard by a panel of three judges. No bankruptcy judge may hear an appeal originating from his or her district. 28 U.S.C. § 158(b)(5).[4]

The BAP judges are all active bankruptcy court judges from districts within the ninth circuit. All maintain a regular trial docket in their home districts. Currently there are six members of the BAP; the seventh position is being intentionally left vacant to reflect the BAP's reduced filing numbers and to allow opportunities for *pro tem* judge participation. The current members of the BAP are:

Hon. Jim D. Pappas (D. Idaho), Chief Judge
Hon. Randall L. Dunn (D. Oregon)
Hon. Meredith A. Jury (C.D. Cal.)
Hon. Bruce A. Markell (D. Nevada)
Hon. Eileen W. Hollowell (D. Ariz.)
Hon. Ralph B. Kirscher (D. Mont.)

BAP judges are appointed by the Circuit for a seven-year term. At the end of that term, they may seek reappointment for an additional three years. Each BAP judge has an additional law clerk. Some judges utilize both clerks on BAP matters and on their regular "home court" assignments while others segregate the duties of their clerks.

The BAP also routinely utilizes *pro tem* judges in order to give appellate experience to other bankruptcy judges within the Ninth Circuit. *Pro tem* judges sit for one-day merits calendar

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[4] 28 U.S.C. § 158(b)(5) provides:

> An appeal to be heard under this subsection shall be heard by panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

assignments and have equal votes with the regular BAP judges. Normally, they only participate on motions in appeals where they have been assigned to hear the merits. The contribution of the *pro tem* judges allows the BAP to set more calendars and hear more cases than it could otherwise.

The BAP hears cases nine months out of the year, with the three-judge panels traveling to various venues in the Ninth Circuit. The Panel does not normally hold hearings during April, August and December.

The BAP utilizes both teleconferencing and video conferencing, and continues to explore the use of new technology to facilitate more convenient hearings for counsel and litigants. Video conference equipment in both the Pasadena and San Francisco courtrooms allows litigants to appear in scheduled cases via live video from bankruptcy courthouses throughout the Ninth Circuit.

The BAP is staffed by its clerk, two staff attorneys, and other personnel who maintain the files and dockets and otherwise run the business of the court.

Address: Bankruptcy Appellate Panel, Court of Appeals Building, 125 South Grand Avenue, Pasadena, CA 91105
Telephone: Appeals from Central District of California (626) 229-7220; appeals from all other districts (626) 229-7225.
Filing Hours: Monday - Friday, 8:30 a.m. to 5:00 p.m.
Website: http://www.bap09.uscourts.gov

IV. PRACTICE BEFORE THE BAP AND ELECTRONIC FILING

To practice before the BAP, an attorney must be admitted and in good standing to practice before the Ninth Circuit Court of Appeals, or before a district court within the Ninth Circuit. An attorney not so admitted may request permission to appear in a specific case by motion to the BAP. 9th Cir. BAP R. 9010-1.

Electronic filing is now **mandatory** for all attorneys appearing before the BAP. Because the BAP only recently implemented electronic filing, the governing procedures are subject to change. The best way to keep apprised of the BAP's electronic filing procedures is through the Administrative Order Regarding Electronic Filing in BAP Cases, which is posted on the

BAP's Electronic Case Filing page, on the above-referenced website. Here are a few procedural highlights:

- Electronic filing currently is now mandatory for all attorneys in all BAP cases filed on or after March 31, 2010 (see Admin. Order at Rule 1(a));

- Any litigant who is not a licensed attorney authorized to practice before the BAP must obtain permission by filing a motion with BAP if they desire to register for BAP electronic filing (see Admin. Order at Rule 2(d));

- some documents currently may not be electronically filed, most notably, the appendix that accompanies a party's brief may not be electronic filed (see Admin. Order at Rule 3); and

- when a document is electronically filed, the BAP neither requires nor allows the filing of paper copies of the electronically-filed document, unless otherwise specifically ordered (see Admin. Order at Rule 10(b)).

V. STARTING THE APPEAL PROCESS

A. Time and Method for Filing a Notice of Appeal

A notice of appeal must be filed with the bankruptcy court within 14 days of entry of the judgment, order, or decree appealed from. FRBP 8001(a), 8002, and 9006(a)(effective December 1, 2009).[5] If a timely notice of appeal is filed, any other party may file a notice of appeal (often a cross-appeal) within 14 days of the date on which the first notice of appeal was filed. Id. The appellant must attach to the notice of

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[5] The Advisory Committee Notes to FRBP 8002 provide that:
2009 Amendments

Throughout the rules, deadlines are amended in the following manner:

- 5-day periods become 7-day periods
- 10-day periods become 14-day periods
- 15-day periods become 14-day periods
- 20-day periods become 21-day periods
- 25-day periods become 28-day periods

appeal a copy of the entered judgment, order or decree from which the appeal was taken, if available. 9th Cir. BAP R. 8001(a)-1. The timely filing of a notice of appeal is "mandatory and jurisdictional." Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978); see also Slimick v. Silva (In re Slimick), 928 F.2d 304, 306 (9th Cir. 1990).

Discretionary extensions may be granted by the bankruptcy court, with some exceptions,[6] upon written motion. Any extension granted may not exceed the later of: (1) 21 days from the expiration of the time for filing a notice of appeal, or (2) 14 days from the entry of the extension order. FRBP 8002(c)(2).

If the motion is filed not later than 21 days after the expiration of the original 14-day period, an extension may be granted upon a showing of excusable neglect. See Pincay v. Andrews 389 F.3d 853 (9th Cir. 2004)(en banc)(mistake by attorney in delegating task of determining appeal deadline to non-lawyer, who misinterpreted the unambiguous deadline, can be considered excusable neglect at the trial court's discretion). Once the appeal period has expired, it cannot be resurrected. The BAP may not extend the time requirements of FRBP 8002. See FRBP 8019 and 9006(b)(3).

B. Tolling Motions

If, within 14 days of entry of the judgment, order or decree, a party files a motion

(1) to amend or make additional findings of fact under FRBP 7052,
(2) to alter or amend the judgment under FRBP 9023,
(3) for a new trial under FRBP 9023, or
(4) for relief under FRBP 9024,

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[6] FRBP 8002(c) prohibits the bankruptcy court from extending the time to appeal orders granting relief from stay; authorizing sale or use of property, extensions of credit and use of cash collateral; assumption and assignment of executory contracts; approval of a Chapter 11 disclosure statement; and confirmation of a plan under Chapters 9, 11, 12 and 13.

then the 14 days for filing an appeal runs from the entry of the order disposing of the last such motion outstanding. FRBP 8002(b).

The BAP considers a motion for reconsideration filed within 14 days to be a motion to "alter or amend the judgment" within the meaning of FRBP 8002(b). Shapiro ex rel. Shapiro v. Paradise Valley Unified School Dist., 374 F.3d 857, 863 (9th Cir. 2004). See generally 16A Wright & Miller, Federal Practice & Procedure, § 3950.4.

C. Premature Notice of Appeal

A premature notice of appeal (a notice of appeal filed after the announcement of a decision but before entry of the judgment or order) is treated as filed after such entry and on the day thereof. FRBP 8002(a).

If the notice of appeal is filed before entry of the order being appealed, the appellant must forward to the BAP clerk a copy of the judgment or order immediately upon entry. 9th Cir. BAP R. 8001(a)-1.

A separate second notice of appeal after entry of the order on appeal is not necessary.

A notice of appeal also is premature if an unresolved tolling motion is pending (see § V.B above).

D. Appeal Fees and *In Forma Pauperis* Motions

A filing and docketing fee of $255 is required and should be made payable to the "Clerk of Court." The fee should be paid to the bankruptcy court at the same time the notice of appeal is filed.

Under Perroton v. Gray (In re Perroton), 958 F.2d 889 (9th Cir. 1992) and Determan v. Sandoval (In re Sandoval), 186 B.R. 490, 496 (9th Cir. BAP 1995), the BAP has no authority to grant *in forma pauperis* motions under 28 U.S.C. § 1915(a) because bankruptcy courts are not "court[s] of the United States" as defined in 28 U.S.C. § 451.

The BAP routinely transfers *In Forma Pauperis* motions to the district court from which the appeal arises for the limited purpose of granting or denying the motion; the cases are then returned to the BAP for determinations on the merits.

However, the fee waiver provisions of 28 U.S.C. § 1930(f), as well as the procedures and guidance promulgated by the Judicial Conference of the United States with respect to this statute, permit the bankruptcy court to waive appellate fees with respect to individual debtors under Chapter 7 whose filing fee has been waived.

E. Election to the District Court (Opt-Out)

The appeal from the bankruptcy court automatically goes to the BAP unless a party timely elects to have the appeal heard by the district court. 28 U.S.C. § 158(c)(1).

A party might choose to have an appeal heard by the district court if other litigation or related appeals are already pending in the district court, or if there is adverse BAP authority on the party's issue.

1. The objection to having the appeal heard by the BAP must be made as a "Statement of Election" in a separate writing. FRBP 8001(e); In re Hupp, 383 B.R. 476, 480 (9th Cir. BAP 2008); Arkansas Teachers Ret. Sys. v. Official Inv. Pool Participants Comm. (In re County of Orange), 183 B.R. 593 (9th Cir. BAP 1995) (election must be in a separate document, filed separately from the notice of appeal). Amended Order Continuing Bankruptcy Appellate Panel of the Ninth Circuit (Amended May 9, 2002).

2. Deadline for appellant's Statement of Election. The appellant's election must be filed at the same time as the notice of appeal. 28 U.S.C. § 158(c)(1); FRBP 8001(e)(1). In Ioane v. Collins (In re Ioane), 227 B.R. 181, 183 (9th Cir. BAP 1998), the BAP held that the statutory deadline for an appellant's election is the time the notice

of appeal is filed (rather than the date that the order is entered), even if the notice of appeal is filed prematurely. If the appellant moves for leave to appeal but fails to concurrently file a separate notice of appeal, the motion for leave shall be treated as if it were a notice of appeal for purposes of calculating the time period for filing an election. 9th Cir. BAP R. 8001(e)-1(b).

3. "Any other party" (e.g., the appellee) must make the election not later than 30 days after service of notice of the appeal. 28 U.S.C. § 158(c)(1). In HBI, Inc. v. Sessions Payroll Mgm't, Inc. (In re Mackey), 232 B.R. 784, 787 (9th Cir. BAP 1999), the BAP held that the 30-day deadline begins to run on the date of the court's mailing, not the date that the order being appealed is entered, and that the 3-day extension provided for by FRBP 9006(f) applies when service is performed by mail. Caution: While the BAP has not yet published a decision on point, it is likely that parties receiving notice by e-mail would not enjoy the 3-day extension under FRBP 9006(f).

4. The BAP "may transfer an appeal to the district court to further the interests of justice, such as when a timely statement of election has been filed in a related appeal, or for any other reason the Panel deems appropriate." 9th Cir. BAP R. 8001(e)-1.

5. FRBP 8001(e)(2) (effective December 1, 2008), permits parties to file a request to withdraw the election in district court. The request must be made by written stipulation of all parties. If a stipulated request is filed, the district court may either transfer the appeal to the BAP or retain the appeal in district court. This is the only procedure that permits a district court to transfer an appeal to the BAP after a valid election has been made.

F. Petition to Appeal Directly to Court of Appeals

1. Where the underlying bankruptcy case was filed on or after October 17, 2005, the parties may petition for permission to appeal directly to the Court of Appeals. Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") § 1501.[7] The petition generally is brought before the Court of Appeals in the same manner as other permissive appeals under FRAP 5. See BAPCPA § 1233(b); In re Blausey, 552 F.3d 1124, 1129-30 (9th Cir. 2009). A timely, effective notice of appeal from a bankruptcy court order or judgment is a prerequisite. FRBP 8001(f)(1).

2. Before the parties file their direct appeal petitions with the Circuit Clerk, they generally must first obtain a certification from either the bankruptcy court, the district court or the BAP, as contemplated in 28 U.S.C. § 158(d)(2)(B). If all of the parties to the appeal unanimously agree, then they may self-certify their appeal. See § V.F.5, infra.[8]

3. A request for certification must be filed in and determined by:

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[7] BAPCPA § 1501 provides in relevant part:

> SEC. 1501. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.
> * * *
> (b) APPLICATION OF AMENDMENTS.—
> (1) IN GENERAL.— Except as otherwise provided in this Act and paragraph (2) [exceptions not applicable here], the amendments made by this Act shall not apply with respect to cases commenced under title 11, United States Code, before the effective date of this Act [October 17, 2005].

Under BAPCPA § 1501, the direct appeal provisions do not apply to appeals arising out of bankruptcy cases filed before October 17, 2005. In re McKinney, 457 F.3d 623, 624 (7th Cir. 2006). Berman v. Maney (In re Berman), 344 B.R. 612, 615 (9th Cir. BAP 2006).

[8] For an example of a certification of an interlocutory appeal by the BAP, see In re Ransom, 380 B.R. 809 (9th Cir. BAP 2007).

i. the bankruptcy court, until a Certificate of Readiness has been received and filed by the BAP or district court, or a motion for leave to appeal has been granted (whichever occurs first); or

ii. the BAP, after: (a) the BAP receives and files a Certificate of Readiness; or (b) the BAP grants leave to appeal; or

iii. (if an election has been timely filed) the district court, after: (a) the district court receives and files a Certificate of Readiness; or (b) the district court grants leave to appeal.

See FRBP 8001(f)(2),(3). See also 28 U.S.C. § 158(d)(2); Frye v. Excelsior College (In re Frye), 389 B.R. 87, 89-91 (9th Cir. BAP 2008) (explaining which court has authority over direct appeal certification request).

4. The court in which the certification request is properly filed must serve the request on all parties to the appeal. FRBP 8001(f)(3)(B).

5. If all of the parties to the appeal unanimously agree that a direct appeal is appropriate, then their self certification must be filed in the appropriate court. FRBP 8001(f)(2)(B). While there is a sixty-day time limit for certification requests made pursuant to 28 U.S.C. § 158(d)(2)(B) (see 28 U.S.C. § 158(d)(2)(E)), there is no express time limit specified for self-certifications, or for a court certification made on the court's own motion.

6. Once a certification is entered on the court's docket, the parties have 30 days to file their petition to appeal to the Court of Appeals with the Clerk of the Court of Appeals. FRBP 8001(f)(5).[9]

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[9] In re Blausey, supra, involved a series of mistakes, in part based on some confusion by the bankruptcy and circuit court clerks' offices over the timing of various steps in the new direct appeal process. Nevertheless, the court made it clear

(continued...)

7. Absent an order to the contrary, neither the issuance of a certification nor the Circuit's granting of a petition for permission to appeal suspends prosecution of an appeal before the BAP or the district court. 28 U.S.C. § 158(d)(2)(D). If the Circuit grants the direct appeal petition, the BAP might either stay or dismiss the corresponding BAP appeal.

8. If leave to appeal is required by 28 U.S.C. § 158(a) and has not yet been granted by the BAP or district court, the authorization of a direct appeal by a court of appeals under 28 U.S.C. § 158(d)(2) shall be deemed to satisfy the requirement for leave to appeal. FRBP 8003(d).

G. Final Orders vs. Interlocutory Orders

In general, the BAP has jurisdiction to hear bankruptcy appeals from final judgments, orders, and decrees. See 28 U.S.C. § 158.

In addition, the BAP has jurisdiction to hear appeals from two types of interlocutory orders:

(1) Orders under 11 U.S.C. § 1121(d) increasing or reducing exclusivity time periods, 28 U.S.C. § 158(a)(2), Official Committee of Unsecured Creditors v. Henry Mayo Newhall Memorial Hospital (In re Henry Mayo Newhall Memorial Hospital), 282 B.R. 444 (9th Cir. BAP 2002); and

(2) Interlocutory orders as to which the BAP grants a motion for leave to appeal, 28 U.S.C. § 158(a)(3). See also Official Comm. of Unsecured Creditors v. Credit Lyonnais Bank Nederland, N.V. (In re NSB Film Corp.), 167 B.R. 176, 180 (9th Cir. BAP 1994). See generally 16 Wright & Miller, Federal Practice & Procedure § 3926.2.

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[9](...continued)
that in the future, the procedural rules would be enforced: "However, bankruptcy petitioners and bankruptcy courts should now be on notice of this potential pitfall. Consequently, future failure to timely file a petition to appeal in these circumstances is unlikely to be given the benefit of the good cause exception." 552 F 3d at 1151.

The BAP lacks jurisdiction to hear appeals from interlocutory orders (except § 1121(d) orders) unless and until the BAP grants leave to appeal.

1. Definition of Finality

The standard for determining finality in the bankruptcy context is more flexible than in other areas. NSB Film Corp., 167 B.R. at 180. In contrast to an ordinary civil case where "a complete act of adjudication ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," a bankruptcy order is final if it "end[s] any interim disputes from which appeal would lie." Slimick, 928 F.2d at 307 n.1 (internal quotation marks and citations omitted).

An order can be appealed under the "flexible finality" doctrine if it "1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." Elliott v. Four Seasons Props., Inc. (In re Frontier Props., Inc.), 979 F.2d 1358, 1363 (9th Cir. 1992).

For a recent discussion of pragmatic finality in bankruptcy, Saxman v. Educ. Credit Mgt. Corp (In re Saxman), 325 F.3d 1168 (9th Cir. 2003) (and the dissent). But see Belli v. Temkin (In re Belli), 268 B.R. 851 (9th Cir. BAP 2001) (holding that, for purposes of jurisdiction over bankruptcy appeals under 28 U.S.C. § 158(a)(1), finality in adversary proceedings does not differ from finality in ordinary federal civil actions under 28 U.S.C. § 1291, and thus FRCP 54(b) applies.).

Examples of orders held to be final include orders:

- Granting or denying relief from stay, In re Excel Innovations, Inc., 502 F.3d 1086, 1092-93 (9th Cir. 2007); In re Conejo Enters., Inc., 96 F.3d 346, 351 (9th Cir. 1996);

- Regarding adequate protection, Kamai v. Long Beach Mortgage Co. (In re Kamai), 316 B.R. 544, 547-48 (9th Cir. BAP 2004);

- Confirming a chapter 11 debtor's reorganization plan, Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.), 761 F.2d 1374 (9th Cir. 1985);

- Allowing or disallowing an exemption, Preblich v. Battley, 181 F.3d 1048, 1056 (9th Cir. 1999);

- Substantively consolidating bankruptcy cases, Alexander v. Compton (In re Bonham), 229 F.3d 750 (9th Cir. 2000);

- Approving a final application for compensation of professional, Circle K Corp. v. Houlihan, Lokey, Howard & Zukin, Inc., (In re Circle K Corp.), 279 F.3d 669 (9th Cir. 2002);

- For sale of property to good-faith purchasers, In re Southwest Products, Inc., 144 B.R. 100 (9th Cir. BAP 1992), but see In re M Capital Corp. 290 B.R. 743 (9th Cir. BAP 2003); Thomas v. Namba (In re Thomas, 287 B.R. 782 (9th Cir. BAP 2002); and

- Dismissing an action, even without prejudice. Nascimento v. Dummer, 508 F.3d 905, 910 (9th Cir. 2007).

Examples of orders held to be interlocutory include orders:

- Denying a motion to dismiss a bankruptcy case or adversary proceeding, Dunkley v. Rega Props., Ltd. (In re Rega Props., Ltd.), 894 F.2d 1136 (9th Cir. 1990); Morrison-Knudsen Co., Inc. v. CHG Int'l, Inc., 811 F.2d 1209, 1214 (9th Cir. 1987); Ditter v. Greenberg (In re Ditter), 205 B.R. 213 (9th Cir. BAP 1996);

- Granting a trustee's motion to employ a professional pursuant to 11 U.S.C. § 327, Sec. Pac. Bank Wash. v. Steinberg (In re Westwood Shake & Shingle, Inc.), 971 F.2d 387 (9th Cir. 1992);

- Denying a motion for summary judgment, Comsource Independent Foodservice Cos., Inc. v. Union Pacific R.R. Co., 102 F.3d 438, 441-42 (9th Cir. 1996);

- Granting partial summary judgment without the certification required by FRCP 54(b), Belli v. Temkim (In re Belli), 268 B.R. 851, 856-57 (9th Cir. BAP 2001); a partial summary judgment certified without sufficient findings is arguably interlocutory. Janus v. Marco Crane & Rigging Co. (In re JWJ Contracting Co., Inc.), 287 B.R. 501, 506 n.7 (9th Cir. BAP 2002), aff'd, 371 F.3d 1079 (9th Cir. 2004).

- Imposing monetary sanctions against an attorney, Cunningham v. Hamilton County, Ohio, 527 U.S. 198 (1999); Cato v. Fresno City, 220 F.3d 1073, 1074 (9th Cir. 2000). But see Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1187 (9th Cir. 2003) (exercising jurisdiction over sanctions issue because immediate review might obviate the need for further fact finding on remand and because court was compelled to immediately review non-sanctions issues, thus avoiding piecemeal litigation); Golant v. Levy (In re Golant), 239 F.3d 931, 935 (7th Cir. 2001) ("we were unable to uncover any cases discussing how Cunningham might alter the long-held view that sanctions which completely eliminate the possibility of a decision on the merits--such as a default judgment or dismissal--are "final" for the purpose of appeal."); Reorganized Solomat Enters., Inc. v. Ibar (In re Solomat Partners, L.P.), 231 B.R. 149, 151 (2d Cir. BAP 1999) (holding that denial of civil contempt motions was final and appealable);

- Granting a motion to reopen a bankruptcy case, Wilborn v. Gallagher (In re Wilborn), 205 B.R. 202 (9th Cir. BAP 1996); and

- Dismissing a complaint with leave to amend. WMX Technologies, Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997).

2. Separate Document Rule

FRBP 7058 requires that the judgment appealed in an adversary proceeding must be entered on a separate document. FRBP 7058, making applicable

FRCP 58; Corrigan v. Bargala, 140 F.3d 815, 817 (9th Cir. 1998); United States v. Schimmels (In re Schimmels), 85 F.3d 416, 420-21 (9th Cir. 1996). FRCP 58 now deems judgments final after 150 days even if not set forth as separate judgments. Application of the separate document rule may be waived. See Sallie Mae Servicing, LP v. Williams (In re Williams), 287 B.R. 787, 791 n. 10 (9th Cir. BAP 2002); Boggan v. Hoff Ford, Inc. (In re Boggan), 251 B.R. 95, 98 n.2 (9th Cir. BAP 2000).

As of December 1, 2009, judgments or orders entered in contested matters do not need to comply with the separate judgment requirement. FRBP 9021 ("A judgment or order is effective when entered under Rule 5003.") and accompanying Advisory Committee Note ("The entry of judgment in adversary proceedings is governed by Rule 7058, and the entry of a judgment or order in all other proceedings is governed by [FRBP 5003].").

3. Minute Entries / Minute Orders

A minute entry is a final order if it states that it is an order, was mailed to counsel, is signed by the clerk who prepared it, and is entered on the docket sheet. Kuan v. Lund (In re Lund), 202 B.R. 127, 130 (9th Cir. BAP 1996). To be a final order, a minute entry also must include "dispositive language sufficient to put the losing party on notice that his entire action -- and not just a particular motion or proceeding within the action -- is over and that his next step is to appeal." Brown v. Wilshire Credit Corp. (In re Brown), 484 F.3d 1116, 1121 (9th Cir. 2007).

4. Leave to Appeal

To appeal an interlocutory order, one must file a notice of appeal along with a motion for leave to appeal. FRBP 8001(b).

Although filed in the bankruptcy court, the leave motion is to the Panel. The Panel is the court that grants or denies leave. The motion for leave to appeal must contain:

(1) A statement of facts necessary to an understanding of the questions to be presented by the appeal;
(2) A statement of the questions to be presented;
(3) A statement of the reasons why the appeal should be heard; and
(4) A copy of the judgment, order, or decree complained of and any opinion or memorandum relating to that order or judgment. FRBP 8003(a).

Depending upon the nature of the interlocutory order, the appellant can also seek certification from the bankruptcy judge under FRCP 54(b), made applicable by FRBP 7054 and 9021 (through FRCP 58).

If the bankruptcy court makes an "express determination that there is no just reason for delay" in entry of a final judgment on a distinct claim or cause of action, the bankruptcy court may direct entry of a final judgment and the matter is then final as to that claim for purposes of appeal.

An order that purports to be a final order on fewer than all causes of action or parties will not be considered final absent such express determination and direction.

i. Standard for Granting Leave to Appeal

Leave to appeal is usually limited to situations that would avoid wasteful litigation, involve a controlling question of law as to which there is substantial ground for difference of opinion, and would materially advance the ultimate termination of the litigation. Roderick v. Levy (In re Roderick Timber Co.), 185 B.R. 601, 604 (9th Cir. BAP 1995); In re Travers 202 B.R. 624, 626 (9th Cir. BAP 1996).

The BAP's decision to deny leave to appeal is an exercise of discretion and generally is

not open to review by the Court of Appeals. Silver Sage Partners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs), 339 F.3d 782, 787-88 (9th Cir. 2003). See also Baldwin v. Redwood City, 540 F.2d 1360, 1364 (9th Cir. 1976) (holding that the appellant could not pursue an interlocutory appeal because it was untimely, but that interlocutory order would merge into the final judgment and could be challenged upon timely appeal from the final judgment). Accord, United States v. 475 Martin Lane, 545 F.3d 1134, 1140-41 (9th Cir. 2008)(voluntary dismissal of interlocutory appeal did not preclude the appellant from later appealing the final judgment).

VI. DESIGNATION OF THE RECORD

A. Perfection of the Appeal

Within 14 days after filing the notice of appeal, the appellant must file with the clerk of the bankruptcy court and serve on the appellee a designation of items to be included in the record ("DOR") on appeal and must file and serve a Statement of Issues on Appeal ("SOI"). FRBP 8006. For appeals pending before the BAP, a DOR is not a copy of every item to be included in the record. It is a list of the items that make up the record, usually identified by docket number and filing date, as well as a description of the item (e.g. "plaintiff's opposition to motion for fees," "declaration in support of motion to dismiss").[10] Within 14 days of service of the appellant's DOR and SOI, the appellee may file a designation of additional items to be included in the record. FRBP 8006.

The Panel need not consider items not included in the DOR. See id. Items that were not before the bankruptcy court generally will not be allowed unless

[10] For appeals pending before the district court, litigants should check their district court's local rules for requirements regarding the DOR.

they pertain to mootness that arose after the order on appeal. See Graves v. Myrvang (In re Myrvang), 232 F.3d 1116, 1119 (9th Cir. 2000); Kirshner v. Uniden Corp. of America, 842 F.2d 1074, 1077 (9th Cir. 1988). The BAP may take judicial notice of the bankruptcy court docket or of matters relevant to the appeal. FRE 201(c) & (f); O'Rourke v. Seabord Surety Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992).

If the appellee has cross appealed, it may file an SOI to be presented on cross appeal and a DOR. Rule 8006. Otherwise, appellees do not file an SOI, even if they disagree with the appellant's framing of the issues. Any such conflict should be addressed in the appellee's brief.

The DOR should list all necessary transcripts. See FRBP 8006. If the DOR identifies transcripts, the party designating the transcripts must immediately deliver to the court reporter and file with the bankruptcy court clerk a written request for the transcripts and make arrangements for payment. Id.

If a tentative ruling is necessary to an understanding of the final ruling, it must be included in the DOR and in the excerpts of record. Welther v. Donell (In re Oakmore Ranch Mgmt.), 337 B.R. 222, 226 (9th Cir. BAP 2006); Gertsch v. Johnson & Johnson Fin. Corp. (In re Gertsch), 237 B.R. 160, 169 (9th Cir. BAP 1999).

The appellant shall serve and file excerpts of the record as an appendix when the opening brief is filed. FRBP 8009(b). See Section VIII.A.9., infra.

B. Completion of the Record

When the reporter completes the transcript, the reporter files it with the clerk of the bankruptcy court. FRBP 8007(a). The reporter is supposed to complete the transcript within 30 days, but may ask the clerk for an extension. Id.

When the record is complete, the clerk of the bankruptcy court transmits a Certificate of Readiness to Transmit Record to the clerk of the BAP. See FRBP 8007(b); 9th Cir. BAP R. 8007(b)-1.

C. Consequences of Incomplete Record

The burden of presenting a proper record to the appellate court is on the appellant. Kritt v. Kritt (In re Kritt), 190 B.R. 382, 387 (9th Cir. BAP 1995). Unless the record before the appellate court affirmatively shows the matters on which appellant relies for relief, the appellant may not argue those matters on appeal. 10 L. King Collier on Bankruptcy ¶ 8006.03[1] (15th ed. rev. 2006); Everett v. Perez (In re Perez), 30 F.3d 1209, 1217 n.12 (9th Cir. 1994).

The failure to provide an adequate record may result in dismissal of the appeal or a waiver of issues dependent upon the record. McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 416-17 (9th Cir. BAP 1999). When an appellant challenges a factual finding, the failure to provide an adequate record may be grounds for affirmance. Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman), 126 B.R. 63, 68 (9th Cir. BAP 1991). But see Ehrenberg v. Cal. State Univ., Fullerton Found. (In re Beachport Entm't), 396 F.3d 1083, 1088 (9th Cir. 2005) (holding that it was inappropriate to dismiss an appeal for an inadequate record where omitted items were minimal and where the Panel neither considered alternative sanctions nor gave the appellant advance warning and an opportunity to cure the procedural defect).

The appellee must police the record, and take steps to assure that it is sufficiently complete to defend the bankruptcy court's ruling. Kyle v. Dye (In re Kyle), 317 B.R. 390, 394 (9th Cir. BAP 2004).

VII. MOTIONS

A. An aspect of appellate practice that is familiar to appellate lawyers, but not necessarily to trial lawyers and trial judges, is the sheer number of motions filed in appellate cases. The BAP receives approximately 40

to 50 motions a month. The BAP judges rotate sitting on monthly "motions panels." These panels consist of one to three judges who decide the motions in a collegial manner. Motions that are not case dispositive (e.g., extension of time to file briefs) may be decided by one or two judges, or by the BAP clerk, based on delegated authority. Typically, the progress of a motion is:

1. The motion is filed with the BAP. FRBP 8011(a).[11] The motion must state with particularity the grounds for bringing the motion and set forth the relief sought. Declarations and supporting materials must be attached. Id.

   On a substantive motion, the opposing party has seven days after service to file an opposition. Id.

   Motions for procedural orders may be acted upon at any time without an opportunity to respond. FRBP 8011(b).

2. The motion is immediately reviewed and summarized by a staff attorney. The staff attorney prepares a written analysis and recommendation, and prepares a proposed form of order.

3. The motion, any responses or replies, and the staff attorney's workup are transmitted to the motions panel judges by e-mail or overnight delivery.

4. Motions panel judges immediately review the paperwork, and communicate their votes and modifications of the proposed order to one another and to the staff attorney. Motions are decided without a hearing unless the court orders

[11] However, a motion for leave to pursue an appeal from an interlocutory order should be filed in the bankruptcy court with the notice of appeal. See FRBP 8001(b); 8003. For detailed information on interlocutory orders and leave motions, see section V.G., supra.

otherwise. FRBP 8011(c). Hearings on motions are extremely rare.

5. Once a decision has been voted upon by each of the panel judges and certified by the assigned lead judge, the clerk will issue the order on behalf of the Panel and distribute it to the parties.

   Occasionally, the panel judges will differ, which results in a dissent or a separate concurrence on the motion.

   Motions are handled expeditiously so that disposition of the appeal is not delayed. Orders disposing of motions are rarely published except where an important point of law has been resolved (e.g., T.C. Invs. v. Joseph (In re M Capital Corp.), 290 B.R. 743, 747 (9th Cir. BAP 2003) (burden of proof on party asserting good faith seeking protection of 11 U.S.C. § 363(m) to prove good faith with evidence); Ho v. Dai Hwa Electronics (In re Ho), 265 B.R. 603, 604-05 (9th Cir. BAP 2001) (bankruptcy court retains jurisdiction to rule on motion for stay pending appeal after notice of appeal has been filed).

6. Rulings by a motions panel are not binding on the merits panel. Wiersma v. O.H. Kruse Grain & Milling (In re Wiersma), 324 B.R. 92, 104 n. 12 (9th Cir. BAP 2005).

B. Motions for Stay Pending Appeal

Requests for a stay pending appeal normally should be presented to the bankruptcy judge first. FRBP 8005. The bankruptcy court retains jurisdiction to rule on a motion for stay pending appeal after a notice of appeal has been filed. Ho, supra.

Parties may file a motion for stay pending appeal directly with the appellate court only if an explanation is given why relief was not first sought from the bankruptcy court. FRBP 8005.

The movant has the burden of showing that the bankruptcy court abused its discretion in not granting a stay. 9th Cir. BAP R. 8011(d)-1 (explanatory note) (citing Wymer v. Wymer (In re Wymer), 5 B.R. 802, 805-07 (9th Cir. BAP 1980)). A stay pending appeal is in the nature of a preliminary injunction and must satisfy four elements: (1) appellant is likely to succeed on the merits; (2) appellant will suffer irreparable injury if no stay is granted; (3) no substantial harm will come to appellee as a result of a stay; and (4) the stay will not harm the public interest. Wymer, 5 B.R. at 806.

The bankruptcy court may require the posting of a bond as a condition of granting a stay pending appeal. FRBP 8005. If an appeal is from a money judgment in bankruptcy, the supersedeas stay is available as a matter of right. The court has discretion in determining the sufficiency of the bond and the adequacy of the surety. FRBP 7062(d); Farmer v. Crocker Nat'l Bank (In re Swift Aire Lines, Inc.), 21 B.R. 12, 13-14 (9th Cir. BAP 1982).

C. Motions to Dismiss for Lack of Jurisdiction

Appellants occasionally appeal an issue that the BAP does not have jurisdiction to consider for various reasons, including the appellants lack standing, the notice of appeal was untimely, or the appeal has become moot. Although jurisdictional issues may be raised by the court sua sponte, see Vylene Enters., Inc. v. Naugles, Inc. (In re Vylene Enters., Inc.), 968 F.2d 887, 889 (9th Cir. 1992), it generally makes sense for an appellee to file a motion to dismiss the appeal as early as possible to save the cost of briefing in a case that will ultimately be dismissed. Thus, it is important to recognize the following concepts of finality, standing and mootness in a bankruptcy context.

1. Untimeliness and Lack of Finality

Appeals can be either too early or too late (§§ V.A - V.C, V.G, above). Both defects can be the basis for a motion to dismiss for lack of jurisdiction.

2. Lack of Standing

Standing is a jurisdictional issue that is open to review at all stages of the litigation. See National Org. For Women, Inc. v. Scheidler, 510 U.S. 249, 255 (1994). Questions of standing are reviewed de novo. See Barrus v. Sylvania, 55 F.3d 468, 469 (9th Cir. 1995). Because standing is a jurisdictional requirement, the BAP must dismiss an appeal when no standing exists.

Neither the Bankruptcy Code nor Title 28 lays out the requisites for appellate standing. See 1 Collier on Bankruptcy ¶ 5.06. The Court of Appeals and the BAP follow the "person aggrieved" standard for standing in bankruptcy appeals. See Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442-43 (9th Cir. 1983) (only parties that are pecuniarily affected by a bankruptcy court order or judgment have standing to appeal). Accord, Darby v. Zimmerman (In re Popp), 323 B.R. 260, 265 (9th Cir. BAP 2005).

Normally, only a bankruptcy trustee or a debtor-in-possession has standing on appeal to pursue or defend the rights of the bankruptcy estate. A chapter 7 debtor usually lacks standing on appeal unless: (1) the debtor is pursuing or defending his or her own personal rights (as opposed to those of the bankruptcy estate). See Fondiller, 707 F.2d at 442 (stating that, "a hopelessly insolvent debtor does not have standing to appeal orders affecting the size of the estate."); or (2) the bankruptcy estate might be a surplus estate. A debtor has standing to challenge a bankruptcy court's order if a surplus estate is likely. Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774, 778 n.2 (9th Cir. 1999).

The United States Trustee ("UST") has statutory standing conferred by 11 U.S.C. § 307 to appeal and to intervene in an appeal. Stanley v. McCormack, Barstow, Sheppard, Wayte & Carruth (In

re Donovan Corp.), 215 F.3d 929, 930 (9th Cir. 2000).

Beyond appellate standing, there are several other standing doctrines that may be grounds for a motion to dismiss the appeal. See Culver, LLC v. Chiu (In re Chiu), 266 B.R. 743, 748-52 (9th Cir. BAP 2001); In re Godon, Inc., 275 B.R. 555, 563-66 (Bankr. E.D. Cal. 2002).

3. Mootness

In addition to the constitutional mootness implicit in the Article III "case" or "controversy" requirement, two lines of bankruptcy mootness cases have developed in the Court of Appeals. One line focuses on the court's ability to fashion meaningful relief. See Baker & Drake, Inc. v. Public Service Commission of Nevada (In re Baker & Drake, Inc.), 35 F.3d 1348, 1351-52 (9th Cir, 1994); Ederel Sport, Inc. v. Gotcha Int'l L.P. (In re Gotcha Int'l L.P.), 311 B.R. 250, 253-55 (9th Cir. BAP 2004).

The other applies when an order authorizes the sale of property, and implements 11 U.S.C. § 363(m) premised on the particular need for finality of such orders. Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1172 (9th Cir. 1988) ("Bankruptcy's mootness rule 'developed from the general rule that occurrence of events which prevent an appellate court from rendering effective relief renders an appeal moot, and the particular need for finality in orders regarding sales in bankruptcy.'"); Arnold & Baker Farms v. United States (In re Arnold & Baker Farms), 85 F.3d 1415, 1419-20 (9th Cir. 1996), cert. denied, 519 U.S. 1054, 117 S. Ct. 681 (1997); Vista Del Mar Assocs., Inc. v. West Coast Land Fund (In re Vista Del Mar Assocs.), 181 B.R. 422, 424-25 (9th Cir. BAP 1995).

Note, however, that this mootness rule operates only when a purchaser bought an asset in good

faith. See T.C. Invs. v. Joseph (In re M Capital Corp.), 290 B.R. 743, 746 (9th Cir. BAP 2003) (emphasizing the need to establish an evidentiary record with necessary findings of fact and conclusions of law on the good faith issue).

Examples of Mootness

The following are common examples of mootness in the bankruptcy context:

- When funds have been disbursed to non-parties or when the failure to obtain a stay causes a change of circumstances to the point where it would be inequitable to consider the merits of the appeal. Ederel Sport, Inc. v. Gotcha Int'l. L.P. (In re Gotcha Int'l. L.P.), 311 B.R. 250, 253-55 (9th Cir. BAP 2004);

- Where a chapter 11 plan has "been so far implemented that it [would be] impossible to fashion effective relief for all concerned" and where reversal of the order confirming the plan "would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court." Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.), 652 F.2d 793, 797 (9th Cir. 1981); but cf, Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.) 293 B.R. 489 (9th Cir. BAP 2003) (concluding that chapter 11 plan was not so far consummated, or so exceedingly complex, as to render it impossible to fashion meaningful relief);

- Where real property central to the appeal has been foreclosed upon without leaving appellant statutory rights of redemption, see Onouli-Kona Land Co., 846 F.2d at 1172-73;

- Orders involving § 363(m), which approve a sale or lease of property, Paulman v. Gateway Venture Partners III, L.P. (In re Filtercorp., Inc.), 163 F.3d 570, 576 (9th Cir. 1998); but see Thomas v. Namba (In re Thomas), 287 B.R. 782, 786 (9th Cir.

BAP 2002) (remanding for factual determination of good faith purchaser).

D. Emergency Motions

1. If the motion requests immediate action in order to avoid irreparable harm, the word "EMERGENCY" should appear in the title. FRBP 8011(d). Include a cover page bearing the label "Emergency Motion" in large, bold type. 9th Cir. BAP R. 8011(d)-1(a). An original and three copies of both the motion and the appendix, containing the items specified by 9th Cir. BAP R. 8011(d)-1(c), must be filed with the BAP clerk.

2. Always attach a declaration stating the nature of the emergency. FRBP 8011(d); 9th Cir. BAP R. 8011(d)-1(b). The motion should also state whether all grounds in support of the motion were submitted to the bankruptcy judge, and if not, why the motion should not be remanded to the bankruptcy judge for reconsideration. FRBP 8011(d).

3. Notify opposing counsel and state in a declaration when and how counsel was notified; there is a specific duty on the movant to "make every practicable effort to notify opposing counsel in time for counsel to respond to the motion." FRBP 8011(d). The motion papers must be accompanied by a proof of service showing service on all parties. 9th Cir. BAP R. 8011(d)-1(d).

4. Include an appendix that contains a conformed copy of the notice of appeal and the entered judgment, order or decree from which the appeal was taken. 9th Cir. BAP R. 8011(d)-1(b).

5. If the emergency motion concerns a stay pending appeal, the appendix must contain: (1) A conformed copy of the bankruptcy court's order denying or granting the stay and an explanation by the court of its ruling, or a declaration explaining why such a copy is unavailable; and (2) Copies of all

papers regarding the stay filed in the bankruptcy court. 9th Cir. BAP R. 8011(d)-1(c).

E. Writ of Mandamus

Although it denied a petition for a writ of mandamus on the merits in Salter v. Bankruptcy Court (In re Salter), 279 B.R. 278 (9th Cir. BAP 2002), the BAP in this case of first impression concluded that it did have the power to issue such a writ because the BAP is a court "established by Act of Congress" which is authorized by the All Writs Act to issue writs of mandamus.

VIII. BRIEFING THE ISSUES

A. Filing and Formatting

1. Historically, a briefing schedule was issued after the BAP clerk received a Certificate of Record from the bankruptcy clerk, and the appellant's opening brief and excerpts of record were due 15 days thereafter. FRBP 8009(a)(1).[12]

2. Now, however, the BAP issues a briefing order in most appeals shortly after the appellant files the notice of appeal. The BAP does this to encourage and facilitate the expeditious resolution of appeals.

3. Briefs are deemed filed on the day of mailing. FRBP 8008(a).

4. The briefing order also sets a due date for the appellees responsive brief, usually 21 days after service of appellant's opening brief. If the appellee has filed a cross-appeal, the brief shall contain the issues and argument pertinent to the cross-appeal, denominated as such, and the response to the appellant's brief. FRBP

[12] The deadline in FRBP 8009(a)(1) was changed to 14 days effective December 1, 2009.

8009(a)(2); 9006(f) (three additional days allowed when service is performed by mail.)

5. Reply Briefs. If the appellant elects to file a reply brief, it typically is due 14 days after service of the appellee's brief. If the appellee has cross-appealed, he or she may file and serve a reply brief to the response of the appellant, addressing the issues presented in the cross-appeal. FRBP 8009(a)(3); 9006(f) (three additional days allowed when service is performed by mail).

6. Contents of Briefs. Briefs shall conform to FRBP 8010 and 9th Cir. BAP R. 8010(a)-1. The appellant's brief shall contain under appropriate headings:
(1) A table of contents, table of cases, statutes and other authorities, with references to the pages of the brief where they are cited;
(2) A statement of the basis of appellate jurisdiction;
(3) A statement of the issues presented and the applicable standard of review;
(4) A statement of the case;
(5) A statement of facts with appropriate references to the record;
(6) An argument; and
(7) A short conclusion stating the precise relief sought. FRBP 8010(a)(1).

   The appellee's brief shall conform to the same requirements established for the appellant's opening brief except that a statement of the basis of appellate jurisdiction, issues, or the case need not be made. FRBP 8010(a)(2).

7. Certificates. Appellant's opening brief must include certifications of (1) interested parties, and (2) related cases. Appellee's responsive brief must also include a certification of interested parties. 9th Cir. BAP R. 8010(a)-1.

8. Formatting of Briefs. The BAP requires briefs to be produced by a standard typographic printing

process with one-inch margins and at least 14 point proportional type or 10.5 point monospaced type, double-spaced, on opaque, unglazed paper. 9th Cir. BAP R. 8010(a)-1.

The BAP Rules also require specific information on the cover, designated cover colors for the opening, responsive and reply briefs, and require the parties to attach certifications of interested parties and related cases to the covers. Id.

9. Length of Briefs. Except with leave of the Panel, the appellant's and appellee's initial briefs shall not exceed 30 pages and reply briefs shall not exceed 20 pages, exclusive of pages containing table of contents, tables of citations and addendums. 9th Cir. BAP R. 8010(c)-1.
A motion for leave to file an oversize brief should be filed well in advance of the deadline for filing the brief. The party requesting the oversize brief should explain the need for going over the page limit (for example, if there are consolidated appeals or multiple issues).

10. Reference to Excerpts of Record (Appendix). The briefs must make specific references to the relevant portions of the record. FRBP 8010(a)(1)(D); see Dela Rosa v. Scottsdale Mem'l Health Sys., Inc., 136 F.3d 1241 (9th Cir. 1998); Mitchel v. General Elec. Co., 689 F.2d 877, 878-79 (9th Cir. 1982).
Opposing parties and the court are not obliged to search the entire record, unaided, for error. Mitchel, 689 F.2d at 879.

An affirmance may be premised on the failure of appellant to provide an adequate record. Ashley v. Church (In re Ashley), 903 F.2d 599, 605-06 (9th Cir. 1990), abrogation on other grounds recognized by In re Denbleyker, 251 B.R. 891, 896 (Bankr. D. Colo. 2000).

An appellate court may dismiss an appeal for failure to provide adequate citations of the record to permit review. See Mitchel, 689 F.2d at

879; see also N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146 (9th Cir. 1997) ("By and large, we have been tolerant of minor breaches of one rule or another. Perhaps we are too tolerant sometimes. But there are times when our patience runs out. Then we strike an appellant's briefs and dismiss the appeal."); Perez, 30 F.3d at 1217 n.12 ("[T]he parties must comply with our rules sufficiently to enable us (and the BAP) to examine those materials that bear on their arguments.").

The BAP's imposition of sanctions for non-compliance with non-jurisdictional procedural requirements is reviewed by the Court of Appeals under an abuse of discretion standard. Morrissey v. Stuteville (In re Morrissey) 349 F.3d 1187, 1190 (9th Cir. 2003)(appropriate sanctions may include summary affirmance of the bankruptcy court's decision). But see Ehrenberg v. Cal. State Univ., Fullerton Found. (In re Beachport Entm't) 396 F.3d 1083, 1088 (9th Cir. 2005) (BAP abused its discretion by dismissing appeal based on deficient excerpts of the record, where it did not consider alternative sanctions and where the record before the BAP was sufficient to decide the merits of the appeal).

11. Appendix to Brief (Excerpts of the Record). Appellant must serve and file with appellant's brief "excerpts of the record" as an Appendix in all BAP appeals. FRBP 8009(b).
Caveat: The requirement of an Appendix is separate and distinct from the requirement of preparing the record per FRBP 8006-8007. Each BAP judge reviewing the appeal receives a copy of the Appendix to Brief, not a copy of the record and not a copy of an appendix to an appellate motion.

    i. Contents. The Appendix must include copies of the following:
        (a) complaint and answer or other equivalent pleadings;
        (b) any pretrial order;
        (c) judgment, order, or decree from which the appeal is taken;

(d) any other orders relevant to the appeal;
(e) the opinion, findings of fact, or conclusions of law filed or delivered orally by the court and citations of the opinion if published;
(f) any motion or response on which the court rendered decision;
(g) the notice of appeal;
(h) the relevant entries of the bankruptcy docket; and
(i) the transcript or pertinent portion thereof. FRBP 8009(b).

ii. The appellee may also serve and file an Appendix that contains additional materials omitted by appellant. Id.

iii. Form. The BAP has prescribed additional form requirements for the Appendix. Among other things, the BAP requires that the Appendix be bound separately with white covers, **be continuously paginated**, have a table of contents, and have **documents divided by tabs**. 9th Cir. BAP R. 8009(b)-1.

iv. Defective Appendix. The BAP is not obligated to examine portions of the record that are not included in the Appendix, Kritt, 190 B.R. at 386-87; accord, Bank of Honolulu v. Anderson (In re Anderson), 69 B.R. 105, 109 (9th Cir. BAP 1986); cf. Ashley, 903 F.2d at 605-06 (incomplete transcript in bankruptcy appeal to District Court), although it may do so, and take judicial notice when appropriate. O'Rourke v. Seaboard Surety Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); In re Bankruptcy Petition Preparers Who Are Not Certified Pursuant to Requirements of the Arizona Supreme Court, 307 B.R. 134, 138 n.5 (9th Cir. BAP 2004).

v. Remedies for a Defective Appendix. The BAP sometimes exercises its discretion to take judicial notice of items from the bankruptcy court record, as reflected in the bankruptcy

court docket. See e.g. Atwood v. Chase Manhattan Mortgage Co. (In re Atwood), 293 B.R. 227, 233, n.9 (9th Cir. BAP 2003). Further, dismissal based on a deficient Appendix may be inappropriate if the BAP has before it "everything needed in order to address the merits of the appeal." See Ehrenberg v. Cal. State Univ., Fullerton Found. (In re Beachport Entm't), 396 F.3d 1083, 1088 (9th Cir. 2005).

B. Standard of Review

The appellant's opening brief must state the appropriate standard of review for the appeal. FRBP 8010(a)(1). Both sides should be familiar with the standard under which the appellate courts will review each issue. Findings of fact are reviewed for clear error, FRBP 8013, and legal issues are generally reviewed de novo, which means that the appellate court looks at the entire record before the bankruptcy court and gives no deference to the bankruptcy judge's legal conclusions. Mixed questions of law and fact are reviewed de novo. Murray v. Bammer (In re Bammer), 131 F.3d 788, 792 (9th Cir. 1997).

The abuse of discretion standard of review applies to many types of bankruptcy court orders. A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). Before reversal is proper under the abuse of discretion standard, the Panel must be definitely and firmly convinced that the bankruptcy court committed a clear error of judgment. Alonso v. Summerville (In re Summerville), 361 B.R. 133, 139 (9th Cir. BAP 2007).

The Panel does not reverse for harmless error, i.e., an error not affecting substantial rights of the parties, and may affirm for any reason supported by the record. 28 U.S.C. § 2111; FRCP 61, incorporated by FRBP 9005; Dittman v. California, 191 F.3d 1020, 1027 n.3 (9th Cir. 1999); Polo Bldg. Group v. Rakita (In re Shubov), 253 B.R. 540, 547 (9th Cir. BAP 2000).

C. Service

Copies of all papers filed by any party (and not required by the rules to be served by the clerk of the BAP) shall, at or before the time of filing, be served by the party or a person acting for the party on all other parties to the appeal. Service on a party represented by counsel shall be made on counsel. FRBP 8008(b).

D. Motions for Extension of Time

1. Procedure. If a party seeks to file a brief but is unable to do so within the time prescribed by the BAP's scheduling order, the party may move for an extension of time for filing a brief. 9th Cir. BAP R. 8009(a)-1. Requests for extensions should be limited to what is justified under the circumstances. A motion for an extension of time for filing a brief shall be made within the time limit prescribed by the BAP Rules for the filing of such brief and shall be accompanied by a proof of service. Id.

2. Contents. The motion shall be supported by a declaration stating the time when the brief is due, how many extensions of time, if any, have been granted, when the brief was first due, and whether any previous requests have been denied or denied in part. The motion shall also state the reasons why such an extension is necessary and the amount of time requested. Finally, the motion shall state the position of the opponent(s) in respect to the motion or state why the moving party has been unable to obtain a statement of such position(s). Id.

3. No Automatic Extensions. The BAP has no obligation to consider a late brief and may impose sanctions such as waiver of oral argument, monetary sanctions, or dismissal. 9th Cir. BAP R. 8009(a)-1(3).

E. Issues on Appeal

1. Generally, appellate courts do not consider arguments "that are not 'properly raise[d]' in the trial courts." O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989). Concrete Equip. Co., Inc. v. Fox (In re Vigil Bros. Constr., Inc.), 193 B.R. 513, 520 (9th Cir. BAP 1996).

2. The Court of Appeals recognizes three narrow, discretionary exceptions to the general rule: (1) to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law. Jovanovich v. United States, 813 F.2d 1035, 1037 (9th Cir. 1987), citing Bolker v. Commissioner of Internal Revenue, 760 F.2d 1039, 1042 (9th Cir. 1985).

3. In addition, the BAP must consider matters affecting its jurisdiction sua sponte even if not briefed by the parties. See Vylene Enters., Inc. v. Naugles, Inc. (In re Vylene Enters., Inc.), 968 F.2d 887, 889 (9th Cir. 1992) (citing Pizza of Hawaii, 761 F.2d at 1377).

4. FRBP 8010(a)(1)(C) requires appellant to file a statement of issues to be decided. The Panel may nevertheless consider an issue not so listed if the issue is purely one of law and there is no prejudice. Huerta-Guevara v. Ashcroft, 321 F.3d 883, 886 (9th Cir. 2003).

5. An appellate court generally will not consider an issue raised by an appellant for the first time in a reply brief. See United States v. Montoya, 45 F.3d 1286, 1300 (9th Cir. 1995) (issues not raised and argued in the opening brief are deemed waived); Law Offices of Neil Vincent Wake v. Sedona Inst. (In re Sedona Inst.), 220 B.R. 74, 76 (9th Cir. BAP 1998). However, an issue raised by an appellant for the first time in a reply brief is not waived if the appellee has briefed the

issue. See United States v. Bohn, 956 F.2d 208, 209 (9th Cir. 1992) ("Although we ordinarily decline to consider arguments raised for the first time in a reply brief, we may consider them if ... appellee raised the issue in its brief.").

F. Developments while Appeal Pending

1. Duty of Attorneys. Attorneys have a "'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation." Board of License Comm'rs v. Pastore, 469 U.S. 238, 240 (1985) (quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975)). See also Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.23 (1997) ("It is the duty of counsel to bring to the federal tribunal's attention, 'without delay,' facts that may raise a question of mootness.").

2. Procedures for Informing the BAP. Although counsel has a duty to inform the court of a change in law or facts that may affect the appeal, neither FRBP nor BAP Rules address the manner for doing so. It is likely that a party may simply provide a case citation with a short explanation (and serve it on all parties to the appeal) why the new ruling, development, or statute substantively affects the appeal. In addition, the BAP has sometimes permitted an appellant to supplement the appellate record. See Plaintiff's Class Claimants in New Jersey Actions v. Elsinore Corp. (In re Elsinore Corp.), 228 B.R. 731, 733 n.1 (9th Cir. BAP 1998) (appellants permitted to supplement appellate record with a district court decision decided after the notice of appeal was filed because it was helpful in clarifying appellants' claims against the debtor). But see Morgan v. Safeway Stores, Inc., 884 F.2d 1211, 1213 (9th Cir. 1989) (denying motion to supplement record with "newly discovered evidence" that was not shown to be in fact newly discovered and was neither probative, nor added to the record).

3. Once the appeal is set for oral argument, it is particularly important to advise the BAP if the

parties have settled or are in the process of settling. If settlement requires approval of the bankruptcy court, any motion for continuance should be supported by a declaration regarding the status of the settlement discussions and indicating whether a hearing on approval has been set before the bankruptcy court.

G. Amicus Curiae Briefs

1. The BAP accepts amicus briefs on occasion. E.g., In re Bankruptcy Petition Preparers Who Are Not Certified Pursuant to Requirements of the Arizona Supreme Court, 307 B.R. 134, 139 (9th Cir. BAP 2004); Rancho Bernardo Ltd. P'ship v. First Alliance Corp. (In re First Alliance Corp.), 140 B.R. 531, 532 (9th Cir. BAP 1992); Canadian Commercial Bank v. Hotel Hollywood (In re Hotel Hollywood), 95 B.R. 130 (9th Cir. BAP 1988); Industrial Indem. Co. v. Seattle-First Nat'l Bank (In re North Side Lumber Co.), 83 B.R. 735, 737 (9th Cir. BAP 1987), aff'd, 865 F.2d 264 (9th Cir. 1988).

2. Since there is no mention of amicus curiae in the BAP Rules or in Part VIII of FRBP, the BAP looks to FRAP 29 and 9th Cir. R. 29-1 for the appropriate procedure. 9th Cir. BAP R. 8018(b)-1 ("Silence of Local Rules"). Under FRAP 29, an amicus brief may only be filed if accompanied by the written consent of all parties, or by leave of court granted on motion or at the request of the court (except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth). FRAP 29.

3. The 9th Circuit forbids reply briefs to amicus briefs, disfavors multiple amicus briefs raising the same points in support of one party, and encourages those who merely wish to join in arguments asserted in another brief to file and serve a short letter so stating in lieu of a brief. Circuit Rule 29-1 (Advisory Committee Note).

IX. ORAL ARGUMENT

A. Scheduling

Oral argument is scheduled in nearly all fully-briefed cases. The BAP clerk typically sets oral argument to occur 30-45 days after the briefs are filed. By separate pleading or letter at the time they file their opening briefs, counsel should notify the BAP clerk of known scheduling conflicts occurring during the third week of upcoming months, when BAP arguments are likely to be scheduled. The annual hearing calendar on the BAP's website, http://www.bap09.uscourts.gov, identifies the dates that the BAP's judges have set aside for argument each year. If counsel knows or suspects that they will be unavailable on one of the listed dates, they should file as soon as practicable a notice of unavailability, as indicated above.

Once a case has been set for oral argument, continuances are rarely granted. 9th Cir. BAP R. 8012-1. The BAP clerk will work with the parties to resolve scheduling conflicts and other matters concerning argument. Prior to contacting the clerk, the movant should contact opposing counsel so that the position of both sides may be conveyed.

B. Submission Without Argument

Counsel usually have the option of electing to submit their case on their briefs without attending oral argument. In that event, unless the Panel dispenses with oral argument entirely, opposing counsel may appear and argue without opposition. Counsel choosing not to present oral argument must notify the clerk and opposing counsel of that election as soon as practicable.

Upon party request or on the Panel's own motion, the Panel may determine that oral argument is not necessary and order the appeal submitted on the briefs without argument. FRBP 8012, 9th Cir. BAP R. 8012-1. Before submitting the appeal without argument, the Panel will give the parties an opportunity to file a statement

explaining why oral argument should be held. FRBP 8012.

C. Location of Hearing

The BAP clerk provides notice of the time and place of argument. The BAP can sit at any location in the Ninth Circuit. When economical and feasible, the appeal will be set for hearing in the district from which the appeal originated. Counsel who desire and agree to a different location should inform the BAP clerk in writing at the earliest possible date and not later than the time the appellee's brief is filed.

D. Video and Telephone Conference Hearings

The BAP permits counsel to request permission to appear and argue via video or telephone conference. Additionally, the BAP may set an appeal for oral argument by video or telephone conference in the interest of expeditious scheduling of oral argument. In such instances, counsel normally has the option of appearing from the remote location or traveling to the site at which the Panel is sitting.

E. BAP Panel Preparation

The three Panel judges review the briefs and the appendices to the briefs before oral argument. Additionally, the "lead" judge (for purposes of writing the final disposition) prepares a bench memorandum that is circulated to the other Panel members. The judges usually discuss each case prior to oral argument to expound upon the issues and survey tentative positions of each judge.

F. Effective Oral Argument

1. Oral argument is typically limited to fifteen minutes per side. Parties aligned on the same side typically are asked to split their fifteen minutes. Appellants usually reserve five of their fifteen minutes for rebuttal. Appellees usually are not allowed to reserve time for rebuttal. In cases of significant complexity or involving

multiple parties, the presiding judge of the Panel will often grant additional time. Counsel believing that more time is needed should file a motion requesting more once the notice of oral argument has been received from the clerk.

2. Counsel should not attempt to address every fact and argument in the briefs; the BAP judges thoroughly review the briefs and the excerpts of record before oral argument. Rather, counsel should summarize the arguments and directly answer the judges' questions in order to clarify factual or legal issues or to address any concerns.

3. At oral argument, counsel should not make the mistake of disregarding or sidestepping a judge's question. Counsel's response may be the pivotal point in a judge's vote. Given the limited amount of time available, counsel should make every effort to satisfy the judges' concerns before moving on to the remainder of the argument.

4. Good appellate advocates are not wedded to their scripts. Counsel should be familiar with every aspect of the case, including the arguments of opposing counsel, pertinent facts, legal issues, controlling or persuasive case law, and the current procedural posture of the bankruptcy case. Counsel should also be prepared to elaborate on legal or factual issues that may not have been emphasized in their briefs, to explore a narrow legal issue, and to discuss the ramifications of a published decision. Fewer than fifteen minutes is certainly acceptable if there are no questions.

G. New Matters or Matters Outside of the Briefs

Generally, an appellate court will not consider matters that are not specifically and distinctly argued in the appellant's opening brief. See United States v. Ullah, 976 F.2d 509, 514 (9th Cir. 1992); see also Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991) (issue raised in reply brief would not be considered, particularly since the appellant's failure to properly

brief the issue "clearly misled the appellee"); Sedona Inst., 220 B.R. at 76.

X. SANCTIONS

Sanctions for frivolous appeals, in the form of just damages and single or double costs, are awarded only upon a separately-filed motion or after notice from the BAP and reasonable opportunity to respond. FRBP 8020. This Rule is strictly enforced, Tanzi v. Commerce-Bank California (In re Tanzi), 297 B.R. 607, 613 (9th Cir. BAP 2003). The panel usually ignores requests for sanctions made in the briefs.

XI. DECISIONS

A. After Oral Argument

The judges confer immediately after the hearing to come to a tentative decision. The judge assigned to write the disposition then circulates a draft for formal votes. Once all comments have been considered by the lead judge, and any concurrences or dissents have been prepared, the lead judge transmits the disposition to the BAP clerk, who files it on behalf of the Panel and serves the parties. Most BAP appeals are decided within eight months of filing of the notice of appeal.

B. Opinions and Memoranda

An "opinion" is a written, reasoned disposition of the case that is intended for publication. See 9th Cir. BAP R. 8013-1. A "memorandum" is a written, reasoned disposition of a case that is not intended for publication. Both memoranda and opinions may be cited, see FRAP 32.1, but unpublished memoranda do not have any precedential value. In 2008, about 16 percent of final BAP decisions were published.

C. Publication

The criteria used by the Panel for determining whether to publish a decision as an opinion are: does it (1) establish, alter, modify, or clarify a rule of law; (2) call attention to a rule of law which appears to have been generally overlooked; (3) criticize existing law;

or (4) involve a legal or factual issue of unique interest or substantial public importance. 9th Cir. BAP R. 8013-1(a).

D. Request for Publication

A request by a party for publication of any unpublished disposition may be made by letter addressed to the BAP clerk, stating concisely the reasons for publication. Such a request must be received by the clerk no later than 28 days after the filing of the memorandum. 9th Cir. BAP R. 8013-1(d).

E. Mandate

The mandate returns jurisdiction over the matter to the bankruptcy court. The BAP mandate is a certified copy of the Panel's judgment or final order that is sent to the bankruptcy court. It is issued in accordance with the time frame set forth in FRAP 41. Copies are not usually sent to the parties.

F. Motions for Rehearing - FRBP 8015

FRBP 8015 requires motions for rehearing to be filed within fourteen days after entry of the judgment of the BAP. The Rule does not set forth standards for granting rehearing, so the Panel looks to FRAP 40, a similar provision, for guidance. Kosmala v. Imhof (In re Hessco Indust., Inc.), 295 B.R. 372, 375 (9th Cir. BAP 2003). Under FRAP 40, a party seeking rehearing must "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." Petitions for rehearing are designed to ensure that the appellate court properly considered all relevant information in rendering its decision, and are not a means by which to reargue a party's case. Id.

If a timely motion for rehearing has been filed, the time for appeal to the Court of Appeals begins to run from the entry of an order disposing of the motion for rehearing. See also FRAP 4(a)(4). Motions for rehearing will delay issuance of the appellate court's

mandate until seven days after the order is entered. FRAP 41.

G. Appeals to the Court of Appeals from Decisions of the BAP - FRAP 6

A notice of appeal to the Court of Appeals must be filed within 30 days after the entry of a final judgment/order of the BAP (60 days if the United States or an officer or agency thereof is one of the parties.) FRAP 4(a)(1) and FRAP 6.

The notice of appeal is filed with the clerk of the BAP. A filing fee of $455 is required and should be made payable to the "Clerk of Court." A timely motion for rehearing under FRBP 8015 tolls the time for filing the notice of appeal. See FRAP 4(a) and FRAP 6.

Unlike the district court and the BAP, the Court of Appeals does not ordinarily have jurisdiction to hear interlocutory appeals. See 28 U.S.C. § 158(d); Silver Sage Partners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs), 339 F.3d 782, 787-88 (9th Cir. 2003). The order on appeal must be a final order of both the bankruptcy court and the district court or BAP. Alexander v. Compton (In re Bonham), 229 F.3d 750, 761 (9th Cir. 2000). However, if the underlying bankruptcy case was filed on or after October 17, 2005, a party might be able to obviate the need for a final order by petitioning for a direct appeal to the Court of Appeals. See 28 U.S.C. § 158(d)(2)(A); FRBP 8003(d). (For a discussion of direct appeals, see section V.F, supra.)

Note: Although remand orders are generally interlocutory, in certain circumstances they may be considered final. See Virtual Vision, Inc. v. Praegitzer Indus., Inc. (In re Virtual Vision, Inc.), 124 F.3d 1140, 1143 (9th Cir. 1997); Vylene Enters., Inc. v. Naugles, Inc. (In re Vylene Enters., Inc.), 968 F.2d 887, 890 (9th Cir. 1992). See also Scovis v. Henrichsen (In re Scovis), 249 F.3d 975 (9th Cir. 2001).

Requests for stay pending appeal to the Court of Appeals are presented first to the BAP, in the same fashion as BAP appeal stay requests are initially made to the bankruptcy court. FRAP 8(a)(1)(A) (made applicable by FRAP 6(b)(1)(C)).

XII. BAP DECISIONS AS PRECEDENT

A. The Court of Appeals has not determined whether BAP decisions are binding in the "circuit as a whole." Zimmer v. PBS Lending Corp. (In re Zimmer), 313 F.3d 1220, 1225 n. 3 (9th Cir. 2002) (noting that the binding nature of BAP decisions is still an open issue in the Ninth Circuit); Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990) (BAP decisions cannot bind district courts, but declining to decide the authoritative effect of a BAP decision).

B. The BAP has held that its decisions bind all bankruptcy courts in the Ninth Circuit. In re Windmill Farms, Inc., 70 B.R. 618, 622 (9th Cir. BAP 1987), rev'd on other grounds, 841 F.2d 1467 (9th Cir. 1988). However, some bankruptcy courts have ruled that BAP decisions do not bind them. Compare CASC Corp. v. Milner (In re Locke), 180 B.R. 245, 254 (Bankr. C.D. Cal. 1995) (BAP decisions not binding on bankruptcy courts), with Life Ins. Co. of Va. v. Barakat (In re Barakat), 173 B.R. 672, 676-80 (Bankr. C.D. Cal. 1994) (BAP decisions binding on bankruptcy courts), aff'd on other grounds, 99 F.3d 1520 (9th Cir. 1996).

C. The BAP, for itself, regards the precedents established in prior published BAP opinions as binding on itself, absent changes in statute or controlling Court of Appeals or Supreme Court precedent. Palm v. Klapperman (In re Cady), 266 B.R. 172, 181 n.8 (9th Cir. BAP 2001), aff'd, 315 F.3d 1121 (9th Cir. 2003); Salomon N.A. v. Knupfer (In re Wind N' Wave), 328 B.R. 176, 181 (9th Cir. BAP 2005), vacated on other grounds, 509 F.3d 938 (9th Cir. 2007). Unpublished memoranda generally are not binding on subsequent panels. See 9th Cir. BAP R. 8013-1(c).

D. As a practical matter, experience teaches that well-reasoned BAP opinions are commonly regarded as

persuasive by the Court of Appeals, and by district courts and bankruptcy courts within the Ninth Circuit, regardless of whether they are formally binding.

E. Effective January 1, 2010, the BAP has a procedure for en banc review. See Saddleback Valley Cmty. Church v. El Toro Materials Co., Inc. (In re El Toro Materials Co., Inc.), 504 F.3d 978, 981 n.7 (9th Cir. 2007) (suggesting that the interests of judicial efficiency would be served if the BAP were to institute en banc procedures in select cases). Under 9th Cir. BAP R. 8012-2, parties may request en banc review by motion filed at the time of the filing of the party's opening brief. See 9th Cir. BAP R. 8012-2(b)(1). The motion must be accompanied by a brief. See 9th Cir. BAP R. 8012-2(b)(1). Any party may file a response and brief within 14 days after the motion is filed. See 9th Cir. BAP R. 8012-2(b)(2). The motion and brief combined must not exceed 15 pages. See 9th Cir. BAP R. 8012-2(b)(3).

XIII. INFORMATION AND STATISTICS

The BAP historically has handled between 49-60% of the total number of Ninth Circuit bankruptcy appeals under 28 U.S.C. § 158(a), with an "opt-out" rate of between 40% and 51%.

Between one third and one half of all BAP appeals go through the entire process of briefing, oral argument, and decision on the merits. Of the appeals that completed that process for the twelve months ending December 31, 2008, the median time from commencement of the appeal to final disposition was 7.9 months. The median time from submission to final disposition was about 37 days. 117 appeals were disposed of on the merits, and the reversal rate was about 5%.

During this same twelve-month period, 164 bankruptcy appeals were filed at the Court of Appeals for second-level appellate review: 63 from decisions of the Bankruptcy Appellate Panel and 101 from decisions of the district courts. Thus, of the 372 appeals closed by the Bankruptcy Appellate Panel during this time period, roughly 83% were fully resolved, with only about 17% seeking second-level review.

The BAP's website (http://www.bap09.uscourts.gov) includes recently-published opinions, unpublished memoranda, the BAP's rules, oral argument calendars and other information for litigants.

XIV. CONCLUSION

This guide is merely an introduction to the sometimes arcane world of bankruptcy appeals. It is a procedural road map that should be of assistance, but is no substitute for preparation and familiarity with the FRBP and the BAP Rules.

One of the main advantages of the BAP is that the Panel judges are seasoned bankruptcy judges who are experts in bankruptcy law. Additionally, the Panel is dedicated to producing the predictability that is a by-product of a uniform body of law based on carefully-reasoned decisions, rendered as promptly as possible.

APPENDIX I

Do's and Don'ts for an Effective Appeal

DO:

1. **Know what relief you want** (and why).

2. **Know your audience.** BAP judges generally possess a level of expertise in bankruptcy matters superior to that of most district court judges and their law clerks.

3. **Understand the role of the appellate court.** While its dominant role is to assess whether the trial court reached the correct result, the appellate court is also concerned with the overall impact of its ruling on the general body of bankruptcy law.

4. **Clarify the standard of review** and frame arguments around that standard.

5. **Simplify the story.** Write with punch - short, crisp, essential facts.

6. **Organize your brief with short headings,** rather than long sentence headings.

7. **Paraphrase quotes whenever possible.** Long block quotes are soporific.

8. **Focus your appellant's argument** on areas where the judge's ruling is most susceptible to being reversed.

9. **Provide an adequate record,** and know what is in it. Follow the rules with respect to organizing, paginating and tabbing the record (appendix), so that the judges and law clerks can find pertinent excerpts quickly.

10. **Use a conversational tone** rather than a formally structured oral argument. This helps facilitate the transitions that are inevitable when interrupted with questions from the Panel. Feel free to take less than your allotted time. Expect the most questions to be asked of the party with the

weakest position, and expect numerous questions about facts and procedure.

11. **Be honest and direct in answering the Panel members' questions.** Acknowledge the weaknesses of your case. Use policy arguments sparingly, if at all.

12. **Listen to the questions being asked of your opponent** and be ready to fill in the blanks on matters of concern to the Panel.

DON'T:

1. Use many words when a few will do.

2. Make convoluted arguments.

3. Make grammatical or typographical errors.

4. Write in a disorganized and unintelligible manner.

5. Attack the trial judge or opposing counsel.

6. Use block quotes extensively.

7. Plagiarize/fail to attribute quoted sources

8. Overuse policy arguments or § 105.

9. Avoid direct answers to the judges' questions.

10. Deflect the question and distract the judge if it is not the question you wanted to hear.

11. Cut off the judge's question in mid-sentence.

12. Be ignorant of the record or mischaracterize the record.

13. Blame your unfamiliarity with the record on the fact that you did not handle the case at the trial level. (The "SODDI" excuse - "some other dude did it").

APPENDIX II

Potential Traps for the Unwary

1. 14-day appeal period. This refers to calendar days, not court days. FRBP 9006(a). The period begins from entry of the judgment or order to be appealed, not notice. Failure to receive notice or failure of the clerk to serve notice of the entry of the order will not excuse an untimely notice of appeal. It is the appealing party's responsibility to monitor the docket for entry of the order.

2. A motion to dismiss an appeal as untimely that is made before the time to request an extension has expired under FRBP 8002(c) alerts your opponent how to save the appeal.

3. An appeal from an untimely tolling motion under FRBP 8002(b) only raises the issue of the appropriateness of the order resolving the tolling motion, not the underlying order. Obtaining reversal of a denial of reconsideration is usually much harder than reversing the initial decision. File a timely appeal or move to extend the time to appeal if your tolling motion is not timely filed.

4. An Appellant's Statement of Election to have the appeal heard by the district court must be filed at the same time as the Notice of Appeal, in a separate document, not attached to or incorporated in the body of the Notice of Appeal.

5. If the order on appeal is not final, appellant must obtain FRCP 54(b) certification from the trial court (applicable via FRBP 7054) or move the BAP for leave to appeal.

6. Obtain a stay pending appeal, if necessary, to avoid mootness. Motions for stay ordinarily will not be considered unless they are first made to the bankruptcy court or the movant explains why the stay wasn't obtained from the bankruptcy court. FRBP 8005. "I didn't think the bankruptcy judge would grant my stay" is not usually a sufficient explanation. The BAP typically denies without prejudice stay requests where the movant does not bring the motion before the bankruptcy court in the first instance. If time is of the essence, make sure that your stay motion

is made before the correct court. At the beginning of your request for stay directed to the bankruptcy court, you may wish to cite Ho v. Dai Hwa Electronics (In re Ho), 265 B.R. 603 (9th Cir. BAP 2001), to show that the bankruptcy court retains jurisdiction to rule on a motion for stay pending appeal, even after a notice of appeal has been filed.

7. Understand the standard of review and what hurdles need to be overcome to obtain a reversal.

8. Separate judgment rule. Be aware that a separate judgment is usually required. Your appeal may be delayed until a separate judgment is entered.

9. Support your brief with your excerpts of the record. Do not expect that the Panel will look at any supporting documents filed with intermediate motions. The excerpts of the record need to stand alone as support for your position. The excerpts may only contain items that are part of the record on appeal. FRBP 8006. Make sure your excerpts include the items listed in FRBP 8009(b); each item is clearly tabbed; pages are consecutively numbered.

10. Arguments not made both before the bankruptcy court and in the opening brief may be considered waived. In re Bankruptcy Petition Preparers, 307 B.R. 134, 141 (9th Cir. BAP 2004).

11. Failing to participate in a BAP appeal may preclude an appeal to the Ninth Circuit. In re Lam, 182 F.3d 1309, 1311 (9th Cir. 1999); and arguments not made to the BAP, absent exceptional circumstances, are waived on appeal to the circuit. In re Burnett, 435 F.3d 971, 976 (9th Cir. 2006).

12. Court of Appeals jurisdiction may differ from BAP or district court jurisdiction. The Court of Appeals generally has jurisdiction over final orders only. A district court or BAP decision on an interlocutory appeal is not reviewable by the Circuit until the matter becomes final at the bankruptcy court level, unless the Court of Appeals grants a direct appeal petition.

13. Motions for reconsideration or rehearing must be made within 14 days after the BAP has rendered its decision. FRBP 8015. A timely motion for reconsideration or rehearing tolls the

time to appeal to the Circuit. An untimely motion does not. The time to appeal to the Circuit is normally 30 days from the entry of the BAP decision; if the United States is a party, the time is 60 days. FRAP 4 and 6.

14. Requests for stay pending appeal to the Circuit are made to the BAP, the same way BAP appeal stay requests are initially made to the bankruptcy court. FRAP 8(a)(1)(A) (made applicable by FRAP 6(b)(1)(C)).

15. Requests for sanctions must be made in a separately-filed motion. FRAP 8020.

16. Appellees: supplement an inadequate record sparingly, as you may be inadvertently helping the appellant. File a motion to dismiss for inadequate record instead. See generally Kyle v. Dye (In re Kyle), 317 B.R. 390, 394 (9th Cir. BAP 2004).

APPENDIX III

NEW BANKRUPTCY APPEAL FILINGS FOR THE TWELVE MONTH PERIOD ENDING JUNE 30, 2010

District	BAP	District Ct[1]	Total
Alaska	5	6	11
Arizona	46	31	77
N. Cal.	35	69	104
E. Cal.	36	39	75
C. Cal.	161	120	281
S. Cal.	9	3	12
Hawaii	2	6	8
Idaho	4	3	7
Montana	9	4	13
Nevada	15	39	54
Oregon	8	5	13
E. Wash.	3	11	14
W. Wash.	25	48	73
TOTALS	**358 (48%)**	**384 (52%)**	**742**

[1] The numbers for bankruptcy appeals to the district courts are taken directly from a statistical caseload table prepared by the Administrative Office of the United States Courts ("AOUSC Table B-23"). The numbers for bankruptcy appeals to the BAP are calculated based on data from AOUSC Table B-23, and on data from the BAP's CM/ECF docketing system. The district court numbers include all appeals in which a timely election was made to have the appeal heard in the district court (both appellant and appellee elections). The BAP numbers exclude all such appeals.

Appendix IV

Rules Governing Post-Trial Motions Determined by Bankruptcy Judge That Affect Appeals Process

Event	Fed. R. Bankr. P.	Time Limit (if any)
Motion to Extend Time to Appeal	8002(c)	Must be filed within 14 days after entry of judgment. Exception for "excusable neglect" - Must be filed not later than 21 days after the expiration of the 14-day period.
Motion to Stay Pending Appeal	8005	
Motion to Voluntarily Dismiss Appeal	8001(c)	Anytime before appeal is docketed and (1) by motion of appellant, or (2) by stipulation of all parties.
Motion to Extend Time in which to File Objections to Proposed Findings of Fact/Conclusions of Law in Non-Core Proceeding	9033 (b)&(c)	Must be served and filed within 14 days after being served with a copy of the proposed Findings of Fact/Conclusions of Law. Exception for "excusable neglect" - Must be made no more than 21 days after expiration of the 14-day period.
Motion for Amended Findings	7052 (possible tolling motion - see 8002(b))	See Federal Rule of Civil Procedure 52(b)
Motion for New Trial or Amendment of Judgement	9023 (possible tolling motion - see 8002(b))	See Federal Rule of Civil Procedure 59
Motion for Relief from Judgement or Order	9024 (possible tolling motion - see 8002(b))	See Federal Rule of Civil Procedure 60;

AMENDED ORDER CONTINUING
THE BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

JUDICIAL COUNCIL OF THE NINTH CIRCUIT AMENDED ORDER CONTINUING THE BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

1. Continuing the Bankruptcy Appellate Panel Service.

(a) Pursuant to 28 U.S.C. § 158(b)(1) as amended by the Bankruptcy Reform Act of 1994, the judicial council hereby reaffirms and continues a bankruptcy appellate panel service which shall provide panels to hear and determine appeals from judgments, orders and decrees entered by bankruptcy judges from districts within the Ninth Circuit.

(b) Panels of the bankruptcy appellate panel service may hear and determine appeals originating from districts that have authorized such appeals to be decided by the bankruptcy appellate panel service pursuant to 28 U.S.C. § 158(b)(6).

(c) All appeals originating from those districts shall be referred to bankruptcy appellate panels unless a party elects to have the appeal heard by the district court in the time and manner and form set forth in 28 U.S.C. § 158(c)(1) and in paragraph 3 below.

(d) Bankruptcy appellate panels may hear and determine appeals from final judgments, orders and decrees entered by bankruptcy judges and, with leave of bankruptcy appellate panels, appeals from interlocutory orders and decrees entered by bankruptcy judges.

(e) Bankruptcy appellate panels may hear and determine appeals from final judgments, orders, and decrees entered after the district court from which the appeal originates has issued an order referring bankruptcy cases and proceedings to bankruptcy judges pursuant to 28 U.S.C. § 157(a).

2. Immediate Reference to Bankruptcy Appellate Panels.

Upon filing of the notice of appeal, all appeals are immediately referred to the bankruptcy appellate panel service.

3. Election to District Court - Separate Written Statement Required.

A party desiring to transfer the hearing of an appeal from the bankruptcy appellate panel service to the district court pursuant to 28 U.S.C. § 158(c)(1) shall timely file a separate written statement of election expressly stating that the party elects to have the appeal transferred from the bankruptcy appellate panel service to the district court.

(a) Appellant: If the appellant wishes to make such an election, appellant must file a separate written statement of election with the clerk of the bankruptcy court at the time of filing the notice of appeal. Appellant shall submit the same number of copies of the statement of election as copies of the notice of appeal. See Bankruptcy Rule 8001(a). When such an election is made, the clerk of the bankruptcy court shall forthwith transfer the case to the district court. The clerk of the bankruptcy court shall give notice to all parties and the clerk of the bankruptcy appellate panels of the transfer at the same time and in the same manner as set forth for serving notice of the appeal in Bankruptcy Rule 8004.

(b) All Other Parties: In all appeals where appellant does not file an election, the clerk of the bankruptcy court shall forthwith transmit a copy of the notice of appeal to the clerk of the bankruptcy appellate panels. If any other party wishes to have the appeal heard by the district court, that party must, within thirty (30) days after

service of the notice of appeal, file with the clerk of the bankruptcy appellate panels a written statement of election to transfer the appeal to the district court. Upon receipt of a timely statement of election filed under this section, the clerk of the bankruptcy appellate panels shall forthwith transfer the appeal to the appropriate district court and shall give notice of the transfer to the parties and the clerk of the bankruptcy court. Any question as to the timeliness of an election shall be referred by the clerk of the bankruptcy appellate panels to a bankruptcy appellate panel motions panel for determination.

4. MOTIONS DURING ELECTION PERIOD

All motions relating to an appeal shall be filed with the bankruptcy appellate panel service unless the case has been transferred to a district court. The bankruptcy appellate panels may not dismiss or render a final disposition of an appeal within thirty (30) days from the date of service of the notice of appeal, but may otherwise fully consider and dispose of all motions.

5. PANELS

Each appeal shall be heard and determined by a panel of three judges from among those appointed pursuant to paragraph 6, provided however that a bankruptcy judge shall not participate in an appeal originating in a district for which the judge is appointed or designated under 28 U.S.C. § 152. In addition, the panel may hear and determine appeals en banc under rules promulgated by and approved as provided in section 8 of this order.

6. MEMBERSHIP OF BANKRUPTCY APPELLATE PANELS

The bankruptcy appellate panel shall consist of seven members serving seven-year terms (subject to reappointment to one additional three-year term). The judicial council shall periodically examine the caseload of the bankruptcy appellate panel service to assess whether the number of bankruptcy judges serving should change. Appointment of regular and pro tem bankruptcy judges to service on the bankruptcy appellate panel shall be governed by regulations promulgated by the Judicial Council.

(a) When a three-judge panel cannot be formed from the judges designated under subparagraph (a) to hear a case because judges have recused themselves, are disqualified from hearing the case because it arises from their district, or are otherwise unable to participate, the Chief Judge of the Ninth Circuit may designate one or more other bankruptcy judge(s) from the circuit to hear the case.

(b) In order to provide assistance with the caseload or calendar relief, to constitute an en banc panel, or otherwise to assist the judges serving, or to afford other bankruptcy judges with the opportunity to serve on the bankruptcy appellate panels, the Chief Judge of the Ninth Circuit may designate from time to time one or more other bankruptcy judge(s) from the circuit to participate in one or more panel sittings.

7. CHIEF JUDGE

The members of the bankruptcy appellate panel service by majority vote shall select one of their number to serve as chief judge.

8. RULES OF PROCEDURE

(a) Practice before the bankruptcy appellate panels shall be governed by Part VIII of the Federal Rules of Bankruptcy Procedure, except as provided in this order or by rule of the bankruptcy appellate panel service adopted under subparagraph (b).

(b) The bankruptcy appellate panel service may establish rules governing practice and procedure before bankruptcy appellate panels not inconsistent with the Federal Rules of Bankruptcy Procedure. Such rules shall be submitted to, and approved by, the Judicial Council of the Ninth Circuit.

9. PLACES OF HOLDING COURT.

Bankruptcy appellate panels may conduct hearings at such times and places within the Ninth Circuit as it determines to be appropriate.

10. CLERK AND OTHER EMPLOYEES.

(a) Clerk's Office. The members of the bankruptcy appellate panel service shall select and hire the clerk of the bankruptcy appellate panel. The clerk of the bankruptcy appellate panel may select and hire staff attorneys and other necessary staff. The chief judge shall have appointment authority for the clerk, staff attorneys and other necessary staff. The members of the bankruptcy appellate panel shall determine the location of the principal office of the clerk.

(b) Law Clerks. Each judge on the bankruptcy appellate panel service shall have appointment authority to hire an additional law clerk.

11. EFFECTIVE DATE

This Order shall be effective as to all appeals originating in those bankruptcy cases that are filed after the effective date of this Order. For all appeals originating in those bankruptcy cases that were filed before October 22, 1994, the Judicial Council's prior Amended Order, as revised October 15, 1992, shall apply. This Order, insofar as just and practicable, shall apply to all appeals originating in those bankruptcy cases that were filed after the effective date of the Bankruptcy Reform Act of 1994, October 22, 1994, but before the date of this Order.

IT IS SO ORDERED.

DATE: April 28, 1995; amended May 9, 2002, amended May 4, 2010.